DISCUSSION PAPER

PREFERENTIAL HIRING RIGHTS IN BUSINESS RELOCATIONS AND CLOSURES

ONTARIO MINISTRY OF LABOUR

JUNE, 1983

Ontario

Office of the Minister

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June 15, 1983

This discussion paper outlines a proposal for establishing preferential hiring rights, in certain defined circumstances, for workers with 5 years' service who are displaced from employment as a result of the permanent closure or relocation of an employer's business operations.

While decisions to relocate or rationalize production facilities are usually caused in large part by economic imperatives, they can and do have serious implications in terms of lost income and work-related benefits for workers who may be displaced. This is especially the case where workers have an entitlement to benefits as a result of long service with one employer.

Unless there are insuperable administrative or policy impediments which have not so far been identified, the Government favours the establishment of certain minimum rights regarding preferential hiring for displaced workers. The refusal of some employers to give serious consideration to such problems has generated a degree of acrimony and labour-management tension in specific instances which has heightened public concern on this issue.

In view of the complex nature of the proposed legislative amendment, I believe it advisable that interested parties have the opportunity to examine and comment on its potential ramifications. Depending on the outcome of that process, the Government plans to proceed with the enactment of legislation along the lines set out in the draft Bill attached. I would ask you to provide me with any written comments by September 15, 1983.

The attached discussion paper provides background and analysis on the proposals as well as a draft Bill to assist in public discussion.

R. H. Ramsay,
Minister.

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I. BACKGROUND

Economic necessity often dictates the relocation or rationalization of corporate production. One of the by-products of this process, however, is the displacement of employees, with its attendant loss of income and work-related benefits.

Over the past few years, considerable public attention has been focussed on the adverse effects of such adjustment on the employees involved. Where an individual with long service to his employer is displaced in a corporate rationalization without being offered an available job at another location of the company, there is a general consensus that such behaviour is unacceptable.

To respond to this problem, it is proposed to require employers to give displaced employees a "right of first refusal" to jobs for which they are qualified at another of the employer's facilities within the province. Some employers, it should be noted, already do this either voluntarily or as a result of a negotiated provision in a collective agreement.

The proposed legislation (see section IV) is designed to reduce the hardship associated with such corporate rationalization without affecting employer discretion to relocate or to improve production processes. Although it has a potentially low cost impact on employers, it could prove to be of significant benefit to those workers most seriously affected by company relocation or reorganization.

Two types of situations are addressed by this legislation. The first concerns the transfer or relocation of production facilities to another site within the province. The second involves situations where the employer discontinues some aspect of his business but continues to operate a like business elsewhere in the province.

Comprehensive data on the incidence of plant closures or relocations are not available, except where the termination of 50 or more workers is involved. Ministry of Labour records indicate that during the two years 1981 and 1982, these totalled 149 cases, involving 18,105 permanent and indefinite layoffs. In practice, however, a preferential hiring right provision would not have been triggered in many of these cases since they involved bankruptcies, complete closures of one-establishment operations, etc.

Further, there is good reason to expect a lower impact for legislated preferential hiring rights than these figures appear to suggest: many employers already offer alternative work to displaced employees on a voluntary basis; in some cases, collective agreements contain provisions on preferential hiring and job transfer rights, although such explicit provisions are not common. Ministry experience indicates that offers of alternate employment are not taken up in large numbers by displaced employees because of the geographical distances involved, the nature of the work offered, employee perceptions of other employment prospects, and many other factors which affect employee willingness to accept a job at a new location.

However, the proposed amendment will serve a useful role in substantially reducing the conflict which experience has shown can result from an employer's refusal to provide job transfers or preferential hiring opportunities for laid-off employees where jobs are available.

II. PRINCIPLES

In the course of designing specific legislation to give effect to the preferential hiring right concept, attention was directed towards incorporating a number of general principles or key features into the proposed statute. An overriding concern was the desire to strike an appropriate balance between the provision of a meaningful benefit to displaced workers and avoidance of unnecessary impediments to employer hiring procedures. The result was that a number of apparently conflicting objectives had to be reconciled.

Equity considerations initially suggested that coverage be as broad as possible in order to capture to the maximum possible extent those termination situations where availability of alternative employment was a distinct possibility, either immediately or in the reasonably near future. In addition, in order that the opportunity for avoidance of the intent of the preferential hiring concept be minimized and to ensure that employers would readily understand their obligations, the notion of an unqualified and specific duty to hire displaced workers was considered, but proved to be impractical.

Efficiency considerations suggested that a rigidly imposed hiring or employee selection requirement on the employer could simply delay the filling of job vacancies to an unacceptable extent. Furthermore, in reality it proved impractical to lay down a detailed "code of hiring conduct" to cope with the wide variety of eventualities likely to arise in a complex termination/re-employment situation, possibly involving several different establishments of the same employer.

The key features of the proposed statute, which were designed to balance equity and efficiency considerations, are as follows:

Coverage:

- Extends to most clear-cut termination situations (closures, relocations) where alternative employment opportunities may be available.

- No limits based on size of establishment or numbers terminated, since cost impact is not expected to be substantial.

- Targets longer service workers as the group for whom the protection of a preferential hiring right is most justified.

Application:

- Based on the creation of obligations on employer and employee to meet certain generalized standards (e.g. employer required to make "every reasonable effort" to offer employment as it becomes available; employee required to indicate decision on a job offer within a "reasonable" time).

- Requirement that job offers be based on the objective criterion of seniority, where practicable, subject to possession of necessary qualifications, skill and ability.

- Limited to a specified time period and to a one-time "reasonable" offer, since creation of an open-ended obligation could effectively impede the filling of vacancies over an extended period of time (a 12-month time frame for retention of preferential hiring rights was selected).

Two difficult questions to resolve related to the integration of a preferential hiring right with existing legislative requirements in termination situations (especially severance pay), and to the retention of service credits (or seniority) when an employee moves to another establishment. The seniority problem is complicated by the implied trade-off between the rights of existing workers and those of workers re-employed under a preferential hiring arrangement.

Briefly, the severance pay and seniority issues were dealt with as follows:

Integration With Other Termination Legislation:

- Built into the proposed statute is the general principle that employers should not be required to provide alternative employment and to pay severance pay in respect of the same termination.

- Since there may be a time-lag between severance pay eligibility and availability of alternative employment, consideration had of necessity to be given to an arrangement which permitted the employee to keep open the possibility of receiving a specific job offer, without at the same time prejudicing any severance pay entitlement. The solution chosen was to allow the employee to elect between these two courses of action at any time during the period for which the preferential hiring right applies.

- Thus, acceptance of a severance payment extinguishes any further obligation to offer a job on the basis of preferential hiring; similarly, acceptance of an offer of employment constitutes a waiver of severance pay entitlement. In the latter case, however, it was decided that a partial exception was justified where the "new" job proved to be only temporary in nature - in that event, it was suggested that termination entitlements (including severance pay) should relate back to the original termination.

- Integration with advance notice (or pay in lieu) required a specific provision in the legislative amendment to avoid the possibility of double payment (pay in lieu and wages) in respect of the same period, where re-employment occurs soon after termination.

Seniority:

- Failure to guarantee preservation of at least some service-related benefits and employment conditions would be contrary to one of the principal aims of the preferential hiring right concept; on the other hand, seniority arrangements in the new establishment often limit or restrict seniority portability.

- The justification for retention of service credits is to some extent dependent on the circumstances of termination and re-employment. Where a relocation or work transfer situation is involved, service credit retention should probably be extended to as wide a range of benefits and working conditions as possible; a more limited retention arrangement may be more appropriate where alternative (different) work is offered.

- Retention of service credits for purposes other than determining fringe benefit entitlement (e.g. for layoff and recall arrangements) requires integration with existing seniority structures, and may impinge on the rights of workers already employed at establishments at which "preferential hires" find employment. Certain safeguards were regarded as necessary in this case, in order to accord overall employment priority to existing workers on layoff at the "new" establishment and to prevent incumbents from being displaced from their present jobs, shifts or departments by "new" workers possessing greater seniority by virtue of their retained service credits.

- The question of retention of service credits for pension purposes is of central importance for long-service workers. However, because of the complex problems associated with the portability of pensions, this is not a matter that could properly be dealt with by an amendment to the Employment Standards Act. Rather it must be dealt with in the context of pension reform currently under examination at both the federal and provincial levels of government.

- It is to be noted that while the draft amendment does nothing to affect the transfer of service credits in accordance with existing pension plans, the Pension Benefits Act under which such plans are registered, has some application. For example, in cases where an establishment closes and the pension plan is wound up, an employee who is at least 45 years old and has been a member of the plan for ten years has the right, subject to the eligibility requirements applicable in a particular case, three months from the time of the wind up to elect whether he or she wishes:

    - to receive an immediate pension;
    - to receive a pension (full or reduced) upon retirement (at normal retirement age or earlier); or
    - to transfer the pension benefit to the pension plan of his or her new employer, or to a registered retirement savings plan.

III. ANALYSIS OF PROVISIONS

The legislative language for the proposed amendment to the Employment Standards Act is contained in its entirety in Section IV. For convenience, each subsection is reproduced below, followed by a short description and commentary.

Section 40b.-(1)

Where an employee's employment is terminated at an establishment because of,

(a) the permanent transfer or relocation of a business or part thereof to another establishment of the employer or an establishment of a person under the direction or control of the employer; or

(b) the permanent discontinuance of a business or part thereof and the employer carries on substantially the same business or part thereof at any establishment of the employer or an establishment of a person under the direction or control of the employer,

the employer or person shall, for the period of twelve months from the transfer, relocation or discontinuance, make every reasonable effort to offer the employee employment as it becomes available at the establishment mentioned in clause (1)(a) or (b) in priority to other persons, if the employee has the required qualifications, skills and ability.

Comment

Defines the two basic situations in which the preferential hiring right will apply, that is,

a) The permanent transfer or relocation of all or part of a business to another establishment of the same (or related) employer within Ontario;

b) The permanent discontinuance of all or part of a business, where the same (or related) employer carries on a similar business elsewhere in Ontario;

Requires the employer to make "every reasonable effort" to offer to displaced workers employment, as it becomes available, on a priority basis at other company establishments defined in a) and b) above for a 12-month period.

- The main purpose of the distinction between situations a) and b) relates to the transfer of the employee's seniority ((see subsections (10), (11) and (12)).

- The employer is not required to guarantee new employment, but to give employment preference to workers displaced from employment in the circumstances defined. The provision applies only to non-managerial workers with a minimum 5

years' service ((see subsection (8)). Its application is modified where there are already workers on layoff at an establishment where new employment becomes available ((see subsection (9)).

- A 12-month time limit on preferential hiring rights is suggested as reasonable. Imposition of a time limit conforms with the approach towards recall rights adopted in most collective agreements. Retention of a preferential hiring right for an indefinite period could be regarded as constituting an undue restriction on the hiring process.

Section 40b.-(2)

An offer of employment under subsection (1) shall be made upon the terms and conditions of employment prevailing at the establishment to which the offer relates, and where more than one employee is entitled to the benefit of subsection (1), the offer shall, so far as is practicable, be made to such employees in descending order of their length of employment with the employer.

Comment

Clarifies that the employment offer referred to shall be based on prevailing conditions at the "new" establishment, and that offers shall be made in order of seniority, where practicable.

- Employees who accept an offer under subsection (1) are not necessarily guaranteed their old wage or working conditions. These may be completely inappropriate in relation to labour market conditions and/or the established wage structure at the "new" establishment.

- The basic objective is to ensure that where available positions are over-subscribed, they will be offered to workers in order of seniority, subject to possession of the requisite qualifications, skill and ability. However, imposition of a rigid seniority-based selection requirement, without the modification implied by so far as is practicable, could create significant hiring problems for an employer, particularly in situations where there is a time-lag between loss of one job and the offer of another.

Section 40b.-(3)

An employee to whom an offer of employment under subsection (1) is made shall notify the employer or person of acceptance or rejection thereof within a reasonable time.

Comment

Requires the employee to whom an offer is made under subsection (1) to notify the employer within a "reasonable" time.

- Again, imposition of a fixed time limit is too inflexible - what is "reasonable" in the circumstances may depend on such factors as whether a relocation is involved, and so on.

Section 40b.-(4)

Subject to subsection (13), an employee who accepts an offer of employment made under subsection (1) shall be deemed to have waived any right to severance pay under section 40a and any termination pay to which the employee is entitled that would otherwise be payable for any period for which the employee receives wages under the offer.

Comment

Employees accepting an offer of employment under subsection (1) generally waive their right to severance pay under the Act, and to termination pay (pay in lieu of notice) to the extent that it provides payment for a period in which employment under (1) is provided.

- The rationale for the waiving of severance pay is that alternative work has been provided by the employer. An exception arises where the worker is terminated from the "new" job within the following 12 months ((see sub-section (13)).

- Termination pay is appropriate since employment may be disrupted for a period of time, before a "new" job is available under (1). However, it would be inequitable to require the employer to pay both termination pay and wages in respect of the same period of time, e.g. if 12 weeks' termination pay is due, but the employee obtains new employment under subsection (1) 8 weeks after termination, the employer will be required to pay termination pay only for the 8 week gap, with the employee deemed to have waived the remaining 4 weeks' pay.

Section 40b.-(5)

An employee who rejects a reasonable offer of employment made by the employer or person under subsection (1) shall be deemed to have released the employer or person from any further obligation under subsection (1).

Comment

Rejection of a reasonable offer of employment made under subsection (1) will release the employer from further obligation.

- The preferential hiring right is provided on a one-time basis only, subject to the offer being "reasonable". A requirement that offers be made on a repeated basis over the full 12-month period could constitute a significant impediment to the hiring process for an employer with frequent job openings.

Section 40b.-(6)

An employee to whom subsection (1) applies who is entitled to severance pay under section 40a may, within the period mentioned in subsection (1), elect to be paid the same and such election shall release the employer or person from any obligation under subsection (1).

Comment

At any time during the 12 month period for which the preferential hiring right applies, an employee may elect to claim any severance pay due under the Act; upon such election, the employer's obligation under subsection (1) ceases.

- This provision allows the employee to delay a severance pay claim in order to keep open the possibility of obtaining an employment offer under (1). If such an offer does not materialize during the 12 months following the relocation or closure of the establishment at which the worker was employed, any severance pay due under Section 40a. of the Act can still be claimed.

- The provision also preserves the general principle that severance pay or the offer of another job with the employer be regarded as alternatives (i.e. the employer is not required to provide both).

Section 40b.-(7)

An employee who was terminated without cause or laid off within a period of twelve months prior to the transfer, relocation or discontinuance mentioned in subsection (1) and who has not claimed and received severance pay under section 40a shall be entitled to the benefit of subsection (1).

Comment

Employees terminated without cause or laid off in the 12 months prior to the relocation or closure of the business, and who have not already claimed and received severance pay under the Act, will also receive the preferential hiring right under subsection (1).

- The purpose of this provision is to ensure that workers are not deprived of their preferential hiring right simply because the employer chooses to gradually reduce staffing levels prior to the actual relocation or closure.

- The exception, where workers have already received a severance payment under the Act, is again aimed at preventing a situation where both severance pay and provision of a preferential hiring right are required.

Section 40b.-(8)

Subsection (1) does not apply to an employee,

a) exercising managerial functions;

b) employed for less than five years by the employer; or

c) whose employer is engaged in the construction, alteration, maintenance or demolition of buildings, structures, roads, sewers, pipelines, mains, tunnels or other works where the employee works at the site thereof.

Comment

Coverage is limited to non-managerial employees with at least 5 years' service and the provision does not apply to workers on construction sites.

- The minimum service limit is the same as for the severance pay requirement under the Act. The rationale is similar in each case, based on considerations regarding job tenure, job attachment and accumulation of service-related benefits.

- The exception for construction-site workers parallels the exclusion under sections 40 and 40a.

Section 40b.-(9)

The right of an employee to an offer of employment under subsection (1) does not apply so as to affect the recall of an employee who was on lay-off at an establishment mentioned in clause (1)(a) or (1)(b).

Comment

Application of the preferential hiring right under subsection (1) is without prejudice to the recall of existing workers laid off at the establishment where alternative employment is available.

- The preferential hiring right provided in (1) could be held to be in conflict with collective agreement seniority provisions, or with company recall policies, in effect at other establishments of the employer. For example, where work is transferred from one establishment to another at which there are workers on layoff with recall rights under a collective agreement, the labour contract will sometimes require that those laid off workers be recalled before the jobs can be made available to others (even to those who held them at the previous location).

- Subsection (9) confirms that type of arrangement, where it exists, and effectively establishes a three-tier employment priority system in situations where a preferential hiring right is triggered and job openings become available at another company establishment. First order of priority goes to the existing workforce at the "new" establishment, whether

already employed or laid off; second order of priority goes to workers displaced at other company establishments in the circumstances defined in subsection (1); finally, the openings become available to all other workers (new hires).

Section 40b.-(10)

Where an employee commences employment at an establishment under an offer made because of a transfer or relocation mentioned in clause (1)(a), the rights of the employee shall be determined under the provisions of the applicable collective agreement, if any, in existence at the establishment or, where there is no collective agreement, under the terms and conditions of employment prevailing at the establishment, and in determining such rights, the period of employment of the employee at the establishment where employment was terminated shall be credited to the employee, but nothing in this subsection shall affect any right or obligation of the employee or the employer under a superannuation or retirement plan or fund, or the Pension Benefits Act.

Comment

Provides, in the case of a permanent transfer or relocation of a business (i.e., under clause (1)(a)), that for the purposes of determining entitlement to benefits and conditions of employment the worker accepting employment under subsection (1) will retain service credits as established at the time of termination. Where pensions are concerned, service credits will be subject to any transfer provisions of the pension plan, and to the Pension Benefits Act.

- One of the principal objectives of the proposed legislative amendment is to alleviate the impact of loss of employment and accumulated benefit entitlements on displaced workers. Accordingly, the aim is to preserve service-related benefits and conditions of employment, where possible.

- This creates practical difficulties in terms of inserting transferred workers into existing seniority systems; on the other hand, failure to ensure retention of service credits would considerably diminish the value to the employee of a preferential hiring right.

- Subsection (10) makes it clear that it is service credits themselves which are retained, and not the level of benefits. In determining the employee's benefits and working conditions at the "new" location, the retained seniority will be applied in accordance with prevailing terms and conditions of employment or with the applicable collective agreement.

- Provision for retention of full service credits for pension purposes, beyond the current protections incorporated in the Pension Benefits Act, gives rise to a number of difficulties relating to pension portability of the kind which were extensively discussed in the Report of the Royal Commission on the Status of Pensions in Ontario (the Haley Commission). Pending possible resolution of the portability issue, subsection (10) reaffirms that rights relating to pension service credits are governed by the provisions of pension plans and the Pension Benefits Act.

Section 40b.-(11)

Where an employee commences employment at an establishment pursuant to an offer made because of a discontinuance mentioned in clause (1)(b), the rights of the employee in relation to vacation, income replacement, medical, hospital, nursing or dental expenses and similar benefits, if any, shall be determined under the provisions of the applicable collective agreement, if any, in existence at the establishment or, where there is no collective agreement, under the terms and conditions of employment prevailing at the establishment, and in determining such rights, the period of employment of the employee at the establishment where employment was terminated shall be credited to the employee but nothing in this subsection shall affect any right or obligation of the employee or the employer under a superannuation or retirement plan or fund, or the Pension Benefits Act.

Comment

Provides, in the case of a permanent discontinuance of a business (i.e., under clause (1)(b)), for the purposes of determining entitlement to various specified fringe benefits the worker accepting employment under subsection (1) will retain service credits as established at the time of termination. Where pensions are concerned, service credits will be subject to any transfer provisions of the pension plan and to the Pension Benefits Act.

- This provides for a more limited form of service-credit retention than subsection (10) since it applies only to specified vacation, income replacement and health benefits (and not, for example, to layoff, recall, or promotion procedures).

- The difference between subsections (10) and (11) rests on the distinction between the two types of termination situations specified in clauses (1)(a) and (1)(b), respectively, which give rise to the preferential hiring rights. In the former situation, work is being transferred or relocated to another establishment. In situations under (1)(b), the work has disappeared but the displaced worker has acquired a preferential hiring right in respect of alternative (different) work at another establishment of the employer. In the latter situation it was felt that there was a lesser justification for the retention of full seniority rights, particularly since they could ultimately impact adversely on existing workers at the "new" establishment.

- As in subsection (10) it is the service credit itself which is retained, not necessarily the level of benefit. Application of the service-credit retention principle as it relates to pensions again defers to the provisions of the pension plan and the Pension Benefits Act.

Section 40b.-(12)

An employee who is employed at an establishment under an offer made under clause (1)(a) shall not be entitled to exercise any right arising under subsection (10) in order to displace another employee in the establishment from his work, work shift or department except in the case of a lay-off.

Comment

Provides that employee rights arising under subsection (10) cannot be exercised in order to displace existing workers from their job, shift or department, except in case of a layoff.

- Under subsection (10), a displaced worker who obtains a job pursuant to a preferential hiring right arising out of the situation described in clause (1)(a) will carry service credits to the new job. This could enable the worker to displace existing employees with lesser seniority from their current jobs or shifts.

- Subsection (12) prevents the exercise of the "transferred" worker's seniority for internal replacements of this kind where no layoff is involved. In event of a layoff, the "transferred" worker's seniority may be applied in order to "bump" those with lower seniority, in accordance with the provisions of the relevant collective agreement, or with the prevailing terms and conditions of employment.

Section40b.-(13)

Notwithstanding subsection (4) and except where an employee is discharged for cause, where an employee commences employment at an establishment of the employer or person under the direction or control of the employer pursuant to an offer made under subsection (1) and is terminated by the employer or person within a period of twelve months immediately following the commencement of employment, the employer or person shall pay to the employee any payment to which the employee was entitled for severance pay under this Act and for all purposes in determining such entitlement the termination shall be deemed to relate back to, and to have occurred at, the time the employee was terminated because of the transfer, relocation or discontinuance of the business or part thereof without account being taken of the period of employment under the offer.

Comment

Where a worker commences employment as a result of an offer made under subsection (1) and is subsequently terminated (other than for cause) within 12 months, the worker's entitlement to severance pay under the Employment Standards Act will be determined on the basis of the circumstances of the original termination which gave rise to the preferential hiring right.

- The purpose of this provision is to protect the employee and to prevent possible illegitimate use of the preferential hiring right procedure as a means of avoiding severance pay obligations.

- A worker accepting another job under subsection (1) is required to waive any severance pay entitlement acquired under the Act. In order to encourage acceptance of alternative employment, some kind of assurance as to possible permanence of the "new" job would be helpful, otherwise the preferential hiring right may be regarded as valueless. Subsection (13)

ensures that if the alternative work proves to be only temporary, the worker will still be entitled to the same severance payment which was waived when the "new" job was accepted.

Section 40b.-(14)

Except as otherwise provided in this section, an employee's rights under section 40 and 40a are not affected by this section.

Comment

Preserves the rights of an employee to termination pay under section 40 and to severance pay under section 40a, except where such rights have been extinguished or modified by subsection (4) of the proposed amendment.

Section 40b.-(15)

Employment before the coming into force of this section shall be taken into account in calculating the years of employment of an employee to whom this section applies.

Comment

In meeting the qualification under subsection (8) of five or more years of employment, employment before the section comes into force is to be taken into account.

The subsection avoids the argument that it is only employment after the section comes into force that is to be counted.

IV. PROPOSED LEGISLATION

PREFERENTIAL HIRING

Preferential Hiring

40b.-(1) Where an employee's employment is terminated at an establishment because of,

(a) the permanent transfer or relocation of a business or part thereof to another establishment of the employer or an establishment of a person under the direction or control of the employer; or

(b) the permanent discontinuance of a business or part thereof and the employer carries on substantially the same business or part thereof at any establishment of the employer or an establishment of a person under the direction or control of the employer,

the employer or person shall, for the period of twelve months from the transfer, relocation or discontinuance make every reasonable effort to offer the employee employment as it becomes available at the establishment mentioned in clause (1)(a) or (b) in priority to other persons, if the employee has the required qualifications, skills and ability.

Terms and conditions of offer

(2) An offer of employment under subsection (1) shall be made upon the terms and conditions of employment prevailing at the establishment to which the offer relates, and where more than one employee is entitled to the benefit of subsection (1), the offer shall, so far as is practicable, be made to such employees in descending order of their length of employment with the employer.

Notice to employer

(3) An employee to whom an offer of employment under subsection (1) is made shall notify the employer or person of acceptance or rejection thereof within a reasonable time.

Severance and termination pay

(4) Subject to subsection (13), an employee who accepts an offer of employment made under subsection (1) shall be deemed to have waived any right to severance pay under section 40a and any termination pay to which the employee is entitled that would otherwise be payable for any period for which the employee receives wages under the offer.

Effect of rejection of offer

(5) An employee who rejects a reasonable offer of employment made by the employer or person under offer subsection (1) shall be deemed to have released the employer or person from any further obligation under subsection (1).

Election

(6) An employee to whom subsection (1) applies who is entitled to severance pay under section 40a may, within the period mentioned in subsection (1), elect to be paid the same and such election shall release the employer or person from any obligation under subsection (1).

Previously terminated or laid off employees

(7) An employee who was terminated without cause or laid off within a period of twelve months prior to the transfer, relocation or discontinuance mentioned in subsection (1) and who has not claimed and received severance pay under section 40a shall be entitled to the benefit of subsection (1).

Exeptions

(8) Subsection 1 does not apply to an employee,

a) exercising managerial functions;

b) who has been employed for less than five years by the employer, or

c) whose employer is engaged in the construction, alteration, maintenance or demolition of buildings, structures, roads, sewers, pipelines, mains, tunnels or other works where the employee works at the site thereof.

Recall of other employees not affected

(9) The right of an employee to an offer of employment under section (1) does not apply so as to affect the recall of an employee who was on lay-off at an establishment mentioned in clause (1)(a) or (1)(b).

Service credits

(10) Where an employee commences employment at an establishment under an offer made because of a transfer or relocation mentioned in clause (1)(a), the rights of the employee shall be determined under the provisions of the applicable collective agreement, if any, in existence at the establishment or, where there is no collective agreement, under the terms and conditions of employment prevailing at the establishment, and in determining such rights, the period of employment of the employee at the establishment where employment was terminated shall be credited to the employee, but nothing in this subsection shall affect any right or obligation of the employee or the employer under a superannuation or retirement plan or fund, or the Pension Benefits Act.

Idem

(11) Where an employee commences employment at an establishment pursuant to an offer made because of a discontinuance mentioned in clause (1)(b), the rights of the employee in relation to vacation, income replacement, medical, hospital, nursing or dental expenses and similar benefits, if any, shall be determined under the provisions of the applicable collective agreement, if any, in existence at the establishment or, where there is no collective agreement, under the terms and conditions of employment prevailing at the establishment, and in determining such rights, the period of employment of the employee at the establishment where employment was terminated shall be credited to the employee but nothing in this subsection shall affect any right or obligation of the employee or the employer under a superannuation or retirement plan or fund, or the Pension Benefits Act.

Exercise of seniority rights

(12) An employee who is employed at an establishment under an offer made under clause (1)(a) shall not be entitled to exercise any right arising under subsection (10) in order to displace another employee in the establishment from his work, work shift or department except in the case of a lay-off.

Further termination

(13) Notwithstanding subsection (4) and except where an employee is discharged for cause, where an employee commences employment at an establishment of the employer or person under the direction or control of the employer pursuant to an offer made under subsection (1) and is terminated by the employer or person within a period of twelve months immediately following the commencement of employment, the employer or person shall pay to the employee any payment to which the employee was entitled for severance pay under this Act and for all purposes in determining such entitlement the termination shall be deemed to relate back to, and to have occurred at, the time the employee was terminated because of the transfer, relocation or discontinuance of the business or part thereof without account being taken of the period of employment under the offer.

Other rights not affected

(14) Except as otherwise provided in this section, an employee's rights under section 40 and 40a are not affected by this section.

Prior employment included

(15) Employment before the coming into force of this section shall be taken into account in calculating the years of employment of an employee to whom this section applies.